IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-237

ALFRED A. GREENBERG,

Appellant,

vs.

STATE OF NEW JERSEY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Alfred A. Greenberg, the appellant, appeals from the final judgments of the Supreme Court of New Jersey dated May 15, 1979 dismissing claims that New Jersey's constitutional, statutory and local ordinance zoning scheme is unconstitutional under the Commerce and Supremacy clauses of the United States Constitution; that New Jersey Constitutional and Court rules abridging jury trial rights violate United States Constitution Amends. VI and XIV, and that New Jersey Court Rule 2:11-3(e)(2) violates Amends. VI and XIV of the United States Constitution.

OPINIONS BELOW

The opinions of the New Jersey Supreme Court are as yet unreported. They are attached hereto in the Appendix. The opinion of the Superior Court of New Jersey, Appellate Division is as yet unreported and is attached hereto in the Appendix.

JURISDICTION

The judgments of the New Jersey Supreme Court dismissing the appeal and denying Certification were entered May 15, 1979. A notice of appeal to this Court was docketed in the New Jersey Supreme Court on August 7, 1979. This appeal is being docketed in this Court within 90 days from the judgments below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

1. Whether N.J. Const. Art. IV §6 ¶2 (1947), New Jersey Statute Tit. 40:55-30, Cranford Township Zoning Ordinance (1959) Art. 4 §24-17(b) and Art. 20 §24-81(a) violate Art. I Sec. 8 (Commerce Clause) and Art. VI, cl. 2 (Supremacy Clause) of the United States Constitution when applied to regulate the apparatus; dimensions and communications capability of a Federally licensed, lawfully operated amateur radio station.

2. Whether N.J. Court Rule 3:23-8(a) violates U.S. Const. Amends. VI (jury trial clause) and XIV §1 (due process clause) by prohibiting jury trials for persons exposed to imprisonment for 270 years.

3. Whether N.J. Const. Art. 6, §1 ¶2 (1947) and New Jersey Court Rule 2:10-5 violates U.S. Const. Amends. VI (jury trial clause) and XIV, §1 (due process clause) by authorizing state appellate courts to exercise original jurisdiction of issues triable of right by a jury.

4. Whether N.J. Court Rule 2:11-3(e)(2) violates U.S. Const. Amends. VI (public trial and assistance of counsel clauses) and XIV, §1 (due process and equal protection clauses) where the effect of such rule is to systematically attack counsel, allow trials without constitutionally-required judicial findings, prevent the construction of a record to protect Federal appeal rights, and provide the linchpin of a separate and unequal system of justice.

CONSTITUTIONAL PROVISIONS STATUTORY PROVISIONS, RULES AND INTERNATIONAL CONVENTIONS

U.S. Const. Art. 1 Sec. 8.

> The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States. . . .

U.S. Const. Art. VI cl. 2.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Amend. VI.

> In all criminal prosecution the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV.

> §1 . . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tit. 47 U.S.C. §303. Powers and Duties of Commission.

> . . . (e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;
>
> (f) Make such regulations not inconsistent with law to prevent interference between stations and to carry out the provisions of this chapter. . . .
>
> • • •
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Tit. 47 U.S.C. §324. Use of Minimum Power.

> In all circumstances, except in the case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communication desired.

Tit. 47 C.F.R. §97.1 Basis and Purpose . . .

> (e) Continuation and extension of the amateur's unique ability to enhance international good will.

Tit. 47 C.F.R. §97.77.

> "Practice to be observed by all licensees: In all respects not specifically covered by these regulations each amateur station shall be operated in accordance with good engineering and good amateur practice."

International Radio Regulations (1959) Ch. IV Art. 14 Section 1.

> §2. All stations shall radiate only as much power as is necessary to ensure a satisfactory service.
>
> §3. In order to avoid interference: . . . radiation in and reception from unnecessary directions shall be minimized where the nature of the service permits by taking the maximum practical advantage of the properties of directional antennae . . .

Art. 12.

> §2. Transmitting and receiving equipment intended to be used in a given part of the frequency spectrum should be designed to take into account the technical characteristics of equipment likely to be employed in neighboring parts of the spectrum.

N.J. Const. Art. IV §6 ¶2. Zoning Laws.

> . . . 2. The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.

N.J. Statute Tit. 40:55-30. General Purposes and Powers.

> Any municipality may by ordinance, limit and restrict to specified districts and may regulate therein, buildings and structures according to their construction, and the nature and extent of their use, and the

nature and extent of the uses of land, and the exercise of such authority, subject to the provisions of this article, shall be deemed to be within the police power of the State. . . . The authority conferred by this article shall include the right to regulate and restrict the height, number of stories, and sizes of buildings; and other structures . . . and the location and uses and extent of use of buildings and structures and land for trade, industry, residence, or other purposes.

Cranford Zoning Ordinance Art. 4, §24-17 (1959).

. . . (b) In the residential zones no accessory building or structure which is accessory to a residential use shall exceed 16 feet in height.

Cranford Zoning Ordinance Art. 20, §24-81 (1959).

. . . (a) No building or structure or part thereof shall be erected . . . . until a permit has been granted by the building inspector . . . .

N.J. Const. Art. VI §5 ¶3.

The Supreme Court and the Appellate Division of the Superior Court may exercise such original jurisdiction as may be necessary to the complete determination of any cause on review.

N.J. Court Rule 2:10-5. Original Jurisdiction.

The appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review.

N.J. Court Rule 2:11-3.

• • •

(e) Affirmance without opinion.

• • •

(2) Criminal Appeals. When in a criminal appeal the Appellate Division determines that some or all of the issues raised by the defendant are clearly without merit, the court may affirm by an opinion which, as to such issues, specifies them and quotes this rule and paragraph.

N.J. Court *Rule* 3:23-8. Hearing on Appeal.

(a) . . . If a verbatim record . . . was made . . . the appeal shall be heard de novo on the record unless . . . the rights of defendant were prejudiced below in which event there shall be a plenary trial de novo without a jury. The appellate court may also supplement the record and admit additional testimony. . . .

RAISING THE FEDERAL QUESTION

At the earliest stage of the proceedings, a pre-trial memorandum, and at the initial hearing in the Cranford Municipal Court, the appellant emphasized that the ordinance violation charged was enacted pursuant to state organic law and that the use of this authority to enact ordinances regulating the apparatus of a federally-licensed amateur radio station, existing as a lawful residential use, was pre-empted by the United States Constitution. The municipal court refused to entertain the question.

In the appeal to the County Court, *de novo* on the record (two-tier system) the contention was expressed in pre-trial memoranda and again in a post-trial motion. The contention was again advanced on direct appeal to the Superior Court, Appellate Division which specifically rejected the claim. The question again was advanced to the New Jersey Supreme Court, the highest appellate court, in a combined direct appeal and petition for a review by way of Certification. The court dismissed the appeal and denied Certification.

The remaining Federal questions ripened in the Appellate Division opinion. The appellant demanded a jury trial in the County Court and alleged in the Appellate Division that the County Court's denial of the demand, entered after judgment, was error that could void the municipal appeal framework. The Appellate Division refused to qualify the procedure, so a direct appeal was lodged in the Supreme Court of New Jersey alleging invalidity of its municipal appeal rule.

Similarly, the original jurisdiction of the Appellate Division was used to decide jury trial issues for the first time in its judgment. The decision was appealed to the

New Jersey Supreme Court alleging unconstitutionality of the State Constitutional and Rule provisions under U.S. Const. Amendments VI and XIV. The appeal was dismissed.

The abbreviated technique Rule for disposition of appellate issues was first applicable after use in the Appellate Division opinion. A direct appeal to the New Jersey Supreme Court alleged invalidity under U.S. Const. Amendments V, VI and XIV and was dismissed.

STATEMENT OF THE CASE

The appellant Alfred A. Greenberg first was licensed as an amateur radio operator by the Federal Communications Commission in 1938 when he lived in Elizabeth, the County Seat of Union County. Except for military service in World War II, he resided in Elizabeth and was an active radio amateur until 1954 when he moved to his present home in Cranford Township, a short distance away where he continued to operate his amateur radio station.

In 1959, Cranford Township enacted the Zoning Ordinance under which appellant was convicted pursuant to the Zoning Article of the New Jersey Constitution and the enabling general legislation enacted by the Legislature.

After his retirement as a Union County deputy sheriff the appellant began to operate his amateur radio station a great deal; he realized that even though he used nearly the maximum legal power to transmit, his transmission, particularly of long distances interstate and internationally, and his reception, would be more reliable and less transmission power would be required if his antenna system was improved. Also, he intended to operate on additional frequencies that his existing antennas would not accommodate. At this time, in or about the Summer of 1975, his existing antennas were mounted on a mast that emerged from the center of his roof.

Appellant decided to put up two towers; one in the rear yard and one in the side yard which would support his antennas at a height of between 55 and 70 feet. Before starting the project, he called the Police Chief to inquire whether local regulation was involved. The chief also was an active amateur; the appellant knew him more than 30 years. The chief advised that there were no municipal prohibitions and told appellant to "go ahead." Appellant

knew that there were many amateur and commercial towers in the municipality.

Appellant ordered his poles. When they arrived the Police Department notified appellant of the large load and escorted the truck to appellant's property which is at the extreme edge of the municipality; the side yard is in the adjoining municipality.

The poles lay on the ground for a short period; then appellant had them emplaced in the side and rear yards.

Shortly thereafter the Building Inspector received a telephone complaint from a resident who was afraid the towers would interfere with television reception.

The Inspector visited appellant and told him that the towers were too high; a permit was needed to put them up, but first a variance had to be obtained.

Inconclusive negotiations were started with Township officials, and appellant began to complain over the air about his situation. Appellant tried to file a permit application; the Building Inspector refused to receive it, and, following an immediate last on-the-air blast by the appellant about Township officials, quasi-criminal complaints were filed on August 27, 1975 by the Building Inspector under Zoning Ordinance provisions charging excessive tower height, building without a permit (Building Code) and side yard dimension violation. The last charge was dropped at trial.

Following a year of unsuccessful negotiation, the case first was tried in December, 1976 in Municipal Court. That court refused to entertain the federal pre-emption question or an equal protection argument that prosecution was selectively employed as a method of regulating a pre-empted area—television interference, and in the alternative to punish the defendant for his on-the-air criticism of the munic-

ipality. Over objection the court allowed the State to amend the complaint changing the charge of building without a permit from the Building Code to the Zoning Code.

After a one-day trial without jury the defendant was convicted of both counts. Subsequently the court imposed sentences of $1,000 on each count. This was the first interpretation of the ordinance that appellant's exposure on each count had been more than a $200 fine and/or 90 days imprisonment.

Appellant appealed to the County Court, *de novo*, which re-opened the record on discrimination prosecution, and he requested a trial by jury. The court never ruled on the jury trial issue until after judgment of conviction was entered. Then a jury trial was denied. The County Court found that construction without a permit only occurred once and reduced the fine on that count to $200. However, the Court retained the $1,000 fine on the excessive height charge.

On appeal to the Superior Court, Appellate Division, the appellant again argued pre-emption and the jury trial issue as well as non-statutory constitutional issues of state use of perjured evidence and failure to disclose exculpatory evidence on demand and when subject to subpoena, matters that had twice been raised in the County Court on motions but had been denied without findings.

The Appellate Division squarely denied the pre-emption claim; held that the ordinance penal provisions were lawful under State law, and found that the excessive height offense only occurred once. The court reduced the fine for that count to $200.

Of ten legal arguments advanced, the court specifically ruled on points 4(B) and 5(A). The rest, including the

jury trial issue and the obstruction of justice claim simply were denied as without merit and without any findings relying on New Jersey Court *Rule* 2:11-3(e)(2).

Appellant immediately appealed to the New Jersey Supreme Court and also sought Certification raising once more the pre-emption issue and its impact on State organic law, the jury trial issue and raised the due process and equal protection adequacy of the court rule authorizing abbreviated disposition of appellant's claims.

The Supreme Court dismissed the appeal and denied Certification on May 15, 1979. A Notice of Appeal to this Court was filed in the New Jersey Supreme Court on August 7, 1979 and this Jurisdictional Statement followed.

THE QUESTIONS ARE SUBSTANTIAL

A. *The Federal Pre-emption Question*

1. *Regulation of Equipment*

Amateur radio is an important and substantial segment of America's technological resource and a significant element of its foreign policy. There are about 350,000 licensed amateurs in the United States, the largest amateur population in the world. At this writing, the United States is preparing to participate in the 1979 World Administrative Radio Conference and as a matter of foreign policy will support the use of the international radio spectrum by radio amateurs and their international ability to communicate effectively in the high frequency bands. This activity is related to the construction for which appellant stands convicted.

Unlike commercial users of radio, amateur radio is completely non-commercial.[1] Amateurs come from all social, political and financial groups. Some have physical handicaps and amateur radio both is a principal link with society and a source of invention of devices to aid the handicapped. The impact of regulation and the threat of litigation has the potential to completely paralyze amateur radio. Unlike the commercial radio services such as television broadcasting and common carriers, there is no rev-

1. Tit. 47 U.S.C. 153(q).

Tit. 47 C.F.R. §97.112 provided in pertinent part:

"§97.112 No remuneration for use of station

(a) An amateur station shall not be used to transmit or receive messages for hire, nor for communication for material compensation direct or indirect, paid or promised.

The Radio Regulations annexed to the International Telecommunications Convention (1961) enacted at Geneva on 21 December, 1959 provide in Chapter 1, Art. 1, Sec. 2:

"*Amateur Service:* A service of self-training intercommunication and technical investigations carried on by amateurs, that is, by duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest."

enue to invest in a return upon litigation; no litigation or regulatory expenses built into the utility rate base, nor even an income tax deduction. The first decision this Court must make on substantiality is the general policy to be followed in burdening a service of this nature. Should primary regulation repose in the F.C.C. with its statutory and Constitutional mandate, uniformity of regulation, enforcement capability and administrative expertise, and with local regulation confined to non-competing, specific compelling local interests, such as safety? Or should the service be forced to bear the chilling effect of omnipresent local enforcement of general state interests [2] which the expert testimony in this case clearly indicates has no rational relationship to the service itself?

Because of the nature of the service there is a locus of risk to chilling by local regulation. The distance that the locus is to be kept from the amateur service is a substantial question of federal policy to be decided on Constitutional principles.

This case presents two distinct pre-emption problems.

The first is the direct conflict with federal policies by a particular state statutory application to be decided under the principles of *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). There is undisputed testimony by Dr. Jerry Sevick of Bell Labs for the appellant leading to a legal conclusion that "compliance with both federal and state regulations is a physical impossibility." *Id.* at 158. No

2. The amateur radio service and its towers are nowhere mentioned in the Zoning Ordinance, the New Jersey Constitution nor the enabling legislation. The height prohibition and prior restraint permit apply to "accessory structures." At the municipal court trial, the State amended the charges away from the Building Code where structural adequacy and safety are treated. Prior to adoption of the Zoning Ordinance the New Jersey Supreme Court declared amateur radio to be a legitimate residential accessory use, a policy which the State adopted at trial with relation to the Zoning Ordinance. See, *Wright v. Vogt*, 7 N.J. 1, 80 A.2d 108 (Sup. Ct. 1950), one of the leading cases of this type, nationwide.

court has ruled on this argument although testimony was in early. The municipal court allowed a record to be made but refused to consider the testimony.

The second argument is made that the 16 foot policy of the general subject-matter ordinance authorized by a general subject-matter statute and Constitutional provision [3] is a dimensional requirement directly conflicting with the Federal policy of Tit. 42 U.S.C. §303(e), (f), (r). These statutes, enacted pursuant to the Commerce Clause, are implemented by the F.C.C. regulation then in force, Tit. 47 C.F.R. §97.77.

The ultimate pre-emption argument based on this regulatory provision is that the F.C.C. intended to occupy 100% of the apparatus and operating regulatory field by referring to an ascertainable standard that may be enforced among the licensed amateurs who are qualified technically by examination.[4]

The last New Jersey court to pass on this question below, the Appellate Division, did so generally, expressly rejecting the dimensional pre-emption argument relying on dictum in an earlier case.[5] An examination of the New York and New Jersey cases rejecting dimensional pre-emption discloses that both courts rely for their conclusions on a purported F.C.C. failure to affirmatively prescribe specific antenna dimensions by regulation except in certain instances. Neither court noted that the dimensional limits that they rely upon are not so much dimensional limits as a trigger mechanism requiring coordination and prior approval of the F.C.C. and air navigation authorities in the vicinity of airports.[6]

3. The delegated use of State power is settled in New Jersey. *Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp.*, 71 N.J. 249, 263, 364 A.2d 1016 (Sup. Ct. 1976).

4. Eg.: Tit. 47 C.F.R. §97.21
"(e) Element 3: General amateur practice and regulations involving radio operation and apparatus and provisions of treaties, statutes, and rules affecting amateur stations and operators."
Dr. Terry Sevick testified to these standards in the initial hearings.

5. *Skinner v. Zoning Bd. of Adjust.*, Cherry Hill Tp., 80 N.J. Super. 380, 391, 193 A.2d 861 (1963). The dictum was adapted from the holding in *Presnell v. Leslie*, 3 N.Y.2d 384, 165 N.Y.S.2d 488, 114 N.E.2d 381, 384-385 (Ct. App. 1957).

It is submitted that the New York and New Jersey courts erred in interpreting supposed Federal silence in all other dimensional instances as authority to regulate.[7] In fact, the purported silence on general antenna dimensions in the section relied on by the state courts is expressly accounted for in Tit. 47 C.F.R. §97.77.[8]

What has happened in legal contemplation is that according to the effect of Dr. Sevick's testimony, the State through its municipality, has acted affirmatively to impose a design requirement upon the active apparatus of a federally-licensed radio station, the substantial federal question reserved in *Ray v. Atlantic Richfield Co., supra*, 435 U.S.

6. Tit. 47 C.F.R. §97.45.

7. " 'Where the failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." *Bethlehem Steel Corp. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947).

8. The international policy is very specific. Ch. IV, Art. 14, Sec. 1. §3 of the International Radio Regulations requires the use of directional antennas to minimize interference. The appellant was engaged in erecting support towers for such antennas when he was prosecuted.

Ch. IV, Art. 12 §1(2) requires state of the art technical compliance, on an international basis using recommendation of the International Telephone and Telegraph Consultative Committee as technical standards where applicable.

Ch. IV, Art. 12 §2 requires internationally, that comparable transmitting and receiving systems be used and take into account equipment used in the neighboring spectrum. Dr. Sevick's testimony indicates that the higher antenna heights would be consonant with internationally acceptable systems and would reduce proximity interference to domestic television and telephone services.

at 179 n.29. One result is that the federal policy requiring use of minimum power has been impeded.[9]

2. *Foreign Relations*

The Federal Communications Act establishing the Federal Communications Commission has as one purpose to make available "a rapid and efficient nationwide, and world-wide wire and radio communication service . . ." Tit. 47 U.S.C. §151. Preceding the first governmental acts, amateur radio historically has been one of the most active media of foreign intercourse. Administratively recognizing its historic and contemporary importance, including the history of United States recognition of the amateur service in international regulatory affairs, the F.C.C. concluded that one basis and purpose of its Regulations was

> "(e) Continuation and extension of the amateur's unique ability to enhance international good will." Tit. 47 C.F.R. §97.1.

Here the United States has expressed an opinion that the role of amateur radio regulation "is inextricably enmeshed in international affairs and foreign policy." *Zschernig v. Miller*, 389 U.S. 429, 434 (1968). At this particular time, in addition to the international character of amateur radio, discrimination against it on the basis of ill-defined, pluralistic, local considerations accompanied by any failure of this Court to act decisively to preserve the international character of the service can only be seen internationally as a sign of increasing insularity and isolationism directly in conflict with the initiatives about to be taken by the United States in the World Administrative Radio Conference of 1979.

9. Tit. 47 U.S.C. §324. Tit. 47 C.F.R. §97.67(b) Ch. IV, Art. 14 Section I of the International Radio Regulations provides:

"§2. All stations shall radiate only as much power as is necessary to ensure a satisfactory service."

> "Where international relations power is involved, any concurrent state authority is restricted to the narrowest of limits." *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).

State regulation of the type involved in this appeal "affects international relations in a persistent and subtle way." *Zschernig v. Miller, supra*, 389 U.S. at 490. The fragile character of this privately-operated medium cannot stand increasing encroachment of state action.

At the present time validity of local regulation involving amateur radio antennas has turned on the local issue whether amateur radio is an accepted residential use.

It is surprising, in view of the pre-eminence of the American amateur body and the political character of international relations, that the United States has tolerated the prevailing practice allowing doctrines governing important parameters of an interstate and international communication service to be set according to local policies with no thought of their international implications. The issue of Federal pre-emption, adequately raised below, is both ripe and timely, and it is fully substantial for a decision by the Court.

B. *The Jury Trial Issue*

Upon conviction in the Municipal Court, the appellant was aware for the first time that Cranford Zoning Ordinance Art. 22 had exposed him to jail for more than a petty offense.[10] The municipal court made no specific

10. Cranford Zoning Ordinance, Art. 22.
"24-96 Penalty
(a) Any . . . person who shall violate any of the provisions of this chapter . . . shall be liable to a fine for not more than $200 or imprisonment for not more than 90 days or both such fine and imprisonment. A separate offense shall be deemed committed on each during or on which a violation occurs or continues."

findings on the quantum of guilt. However, in the eighteen months to trial, exposure could have been $109,500 and imprisonment for 98,500 days (270 years). The issue of duration of the offense, a fact question, had enormous significance.

The appellant appealed to the County Court, asking for a jury trial. New Jersey does not use a full *de-novo* second tier. The trial is "de-novo on the record." The reviewing court has authority to re-open the record for limited purposes, but jury trials are prohibited by the challenged court rule, *R.* 3:23-8(a). In addition to the duration of offense, the appellant was extremely anxious for a jury to hear Dr. James O'Kane, a sociologist, who testified in Municipal Court that the appellant's use qualified as an institutional and public use.[11] The jury trial was denied after a judgment of conviction had been entered.

The appellant alleged error to the Appellate Division, arguing right to a jury trial or invalidity of the Rule. He raised the same issue in both courts specifically citing *Ludwig v. Massachusetts*, 427 U.S. 618, 624 (1976). The Appellate Division held the appellant's argument "without merit." The appellant then raised the constitutional question of invalidity in the New Jersey Supreme Court which refused to decide the question.

One other constitutional issue arose from a specific holding of the Appellate Division. That court held that the excess height violation only was committed once. Appellant immediately appealed to the New Jersey Supreme Court alleging that the limited original jurisdiction of the Appellate Division contained in the New Jersey Constitution and Court Rule was unconstitutional because it was an extension of the jury trial issue already in the case: those appellate findings should be made by a jury. The Supreme Court dismissed the appeal and denied Certification.

11. Cranford Zoning Ordinance Art. 8, §24-39(b)(1) and Art. 1, §24-2 exempted some accessory structures from the height limit provided the use was instructional or public. Dr. O'Kane's opinion was that appellant's use qualified. No court has made findings despite repeated requests.

C. *N.J. Court Rule 2:11-3(e)(2)*

The cited Rule is contained in that portion of the Rules governing appellate practice.[12] It appeared for the first time in these proceedings in the judgment of the Appellate Division. Consequently, the first opportunity to challenge it came in the Certification and direct appeal proceeding to the New Jersey Supreme Court, and this was done alleging invalidity under U.S. Const. Amends. V, VI and XIV, Due Process and Equal Protection Clauses. Review was denied.

There are three extremely substantial and important Federal questions arising from the Appellate Division's use of the challenged rule to dispose of most of the appeal. The first arises in connection with the holding on "paragraph 3" of the Appellate Division opinion:

> "3. Obstruction of justice by the State requires dismissal of the complaint."

Examination of the record will reveal unrebutted evidence of perjury by the Building Inspector, intimidation of witnesses by the State and failure to disclose exculpatory evidence on demand and in response to subpoena. Some of the evidence was uncovered by the appellant and is in the record. Conduct of this type is covered by *Brady v. Maryland*, 373 U.S. 83 (1963) and by the line of cases culminating in rather explicit rules of application set forth in *United States v. Agurs*, 427 U.S. 97, 103-104, 104-106,

12. N.J. Court Rule 2:1 Scope.
"Unless otherwise stated, the rules in Part II govern the practice and procedure in the Supreme Court and the Appellate Division of the Superior Court."

110-111 (1976). As a matter of constitutional compulsion, allegations and evidence of this type require judicial findings and conclusions. *Id.* at 108. None were made in the County Court and Appellate Division construction of the challenged rule thus holds that they are unnecessary below or even at the Appellate level.

Findings by the court are indispensable to orderly judicial review of constitutional questions arising in search and seizure, identification procedures, confessions and any other constitutional matters that must meet threshhold criteria and where a record must be made.

Not only does the Rule fail for want of elementary Due Process requirements; it could not be better calculated to impede the construction of a complete record necessary for the effective assistance of counsel on appeal; of preserving a record of error on appeal and to discriminate against adequate proof of Federal questions necessary to establish jurisdictional grounds for Federal review. See, 28 U.S.C. §1257(2).

A state rule which directly impedes access to this Court at the outcome of a single criminal prosecution should raise the most substantial questions of due process and effectiveness of counsel quite apart from this Court's general, historic interest in adequacy of the record as a due process matter.[13]

As applied in this case, the Rule serves to mask the failure of the trial court to fulfill its constitutional responsibility to make findings and its obstruction of attempts by appellant to make a Federal record. A mask, or whitewash, of this type is not the allowable due process correction

13. See, *e.g.*, *Norvell v. Illinois*, 373 U.S. 420 (1963), *Draper v. Washington*, 372 U.S. 487 (1963), *Hardy v. United States*, 375 U.S. 277 (1964) and the excellent discussion in *Commonwealth v. Anderson*, 441 Pa. 483, 272 A.2d 877, 882 (Pa. Sup. Ct. 1971).

constitutionally contemplated by judicial review. *Frank v. Mangum*, 237 U.S. 309, 335, 336-337 (1915), *Moore v. Dempsey*, 261 U.S. 86, 91 (1923).

The second infirmity of the Rule is undoubtedly the worst. Applying the Rule, the Appellate Division used the language:

> "All but two of the issues now raised are so clearly devoid of merit as to require no discussion."

Counsel on the appeal was and is a member of the New Jersey Bar. The quoted paragraph constitutes an accusation of unprofessional conduct amounting to malpractice of disciplinary magnitude.[14] The Rule only involves criminal appeals, and lawyers handling criminal appeals, including Public Defenders, receive these "one-liners" with great regularity. A pattern of these opinions is evidence of professional neglect.[15] An in-depth analysis of this Rule as it is used in reported cases would disclose widely varied and contradictory application.[16]

The minimum that can be said is that systematic use of this rule to expedite court business by scapegoating lawyers handling criminal appeals is a direct attack upon the effective assistance to clients by those lawyers in viola-

14. "DR 7-102 Representing a Client within the Bounds of the Law.
(A) In his representation of a client, a lawyer shall not:
• • •
(2) Knowingly advance a claim or defense that is unwarranted, under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law."

15. "DR 6-101. Failing to Act Competently.
(A) A lawyer shall not
• • •
(2) Exhibit a pattern of negligence or neglect in his handling of legal matters generally."

16. The annotated rule book (Gann ed.) published by authority of the Administrative Office of the Courts, notes that the Rule was enacted effective May 19, 1975 "with the intention of facilitating the Appellate Division's handling of its ever-increasing work load. . . ."

tion of the Fifth, Sixth, Fourteenth Amendment, Due Process and Equal Protection Clauses, the argument made to the New Jersey Supreme Court.

This Court cannot expect the spirit of effective advocacy to continue indefinitely in the face of such an intimidating barrage. This question is not only substantial but imperative.

The final substantial constitutional infirmity of the Rule is that it serves as the key provision of a dual system of justice, separate, unequal, and clandestine, that functions parallel to a public system and systematically denies to a litigant both a due process system of justice and the laws and procedure existing in the "public" system. Here is how the system works:

Appellant alleged on the opening day of trial in the Municipal Court that he was being prosecuted discriminatorily on the basis of invidious criteria. *Oyler v. Boles*, 368 U.S. 448 (1962). The court promptly declared it would not permit proof, quashed the defense subpoenas, restricted cross-examination of the Building Inspector and issued an oral opinion which did not mention the equal protection claim.

At the point in the expanded County Court hearing that expanded evidence of invidious discrimination and obstruction of justice by the State was offered, the Court terminated the hearing and called for the case to be presented in writing.[17] The County Court confined all further proceedings, including two motions, to writing only.

Then the County Court issued letter opinions. To be published opinions must be approved by a Committee

17. N.J. Court *Rule* 1:2-1 provides in pertinent part:
"All trials, hearings of motions and other applications . . . and appeals shall be conducted in open court unless otherwise provided by rule or statute. . . ."

on Opinions.[18] The Supreme Court of New Jersey has fixed standards for publishable opinions (regardless of whether they are in fact published or selected for publication).[19]

> "The Committee on Opinions shall consider for publication only those opinions submitted in regular opinion form. Letter opinions and transcripts of oral opinions shall not be considered for publication. *Opinions approved for publication shall not cite unpublished opinions* (Emphasis added).

By selecting the oral and letter opinions, both trial courts were permitted by affirmative authority to determine that the content of their decisions never would see the light of day as part of the jurisprudence of the State or even be cited in a published opinion. Thus their complete failure to apply settled State and Federal law to such essentially unrebutted evidence areas as pre-emption, obstruction of justice and jury trial rights carefully was isolated from disclosure and, in turn, is prevented from exerting any impact on the formal jurisprudence of the State.[20] The decisions below seriously "changed or reversed" established principles of State and Federal law.

On the other hand, Appellate Division opinions are in publishable format.

The *Standards* provide that:

18. N.J. Court *Rule* 1:36-2.

19. Standards for Publication — Judicial Opinions (May 2, 1974). Manual of Style — Judicial Opinions (May 2, 1974).

20. The *Standards* indicate that decisions *shall* be published where, among other things:

1. Substantial Federal or State Constitutional questions are decided.
2. New and important law questions are determined.
3. "The decision changes, reverses, seriously questions or criticizes the soundness of an established principle of law."

> "2. The fact that an opinion is by the Appellate Division of the Superior Court rather than a trial court shall weigh in favor of its publication."

Thus, only by using the challenged rule surgically, as was done in this case, can the judicial system convey to the municipality that its zoning system is intact while absolutely insuring that the reasons therefor, resting on radical departures from decisional law, State and Federal, will not impact on or be impacted by the formal system after the case was selected into the underground system protection violations and a separate system of law in the lower courts.

Judicial abuses in history repeat themselves because a mechanism is useful regardless of the reason for its use and they must be periodically excised through eternal vigilance. The judicial mask of *Frank v. Mangum, supra,* was used to enforce racial policies. The same mask, the same mechanism, used in New Jersey, is advertised as an economy measure but is applied systematically to cover up egregious official misconduct and due process and equal protection violations in the lower courts.

While case loads are shibboleths that this Court must consider, maintenance of basic constitutional standards must have priority over arguments of essentially political expediency.

There is no more fundamental nor substantial a Federal question than a demonstration that a State judicial system makes a dual system of justice effective through the use of a linchpin rule in the last public judicial proceeding available of right to all litigants.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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August 13, 1979

OPINION OF THE SUPERIOR COURT OF NEW JERSEY

Argued March 6, 1979—Decided March 16, 1979

Before Judges Halpern, Ard and Antell.

On appeal from Superior Court of New Jersey, Law Division, Union County.

Elson P. Kendall argued the cause for appellant.

Ralph P. Taylor argued the cause for respondent.

PER CURIAM.

Defendant is an amateur radio operator who erected four 55′ high poles next to his home located in a residential zone. He intended to install several antennas on the poles which, when attached, would make the entire structure about 80′ high. The Cranford Municipal Court, and the Union County Court on a *de novo* appeal, found that he had violated two provisions of the Cranford zoning ordinance in erecting the poles without obtaining a building permit and erecting them in excess of the 16′ height limitation for accessory structures. The County Court Judge fined defendant $200 for failing to obtain a permit; and fined him $1,000 for erecting the poles in violation of the 16′ height limitation. Defendant appeals.

A summary of the issues projected in defendant's brief follows:

1. A remand is necessary to allow consideration of the issue of selective enforcement;
2. If a remand is not necessary, this court should decide that he was selectively prosecuted;

3. Obstruction of justice by the State requires dismissal of the complaint;
4. The judge should have declared a Cranford zoning ordinance void;
5. The judge should have found that defendant was exempt from the 16′ height limitation because he was a quasi-public institution;
6. Defendant was denied "a trial on the merits" when the judge failed to permit post-trial argument after counsel had sent certain documentation to him;
7. The judge erroneously ruled that defendant was not entitled to a jury trial;
8. It was error to amend the complaint to charge violation of the Cranford zoning ordinance rather than of the state building code;
9. It was error to deny judgment notwithstanding the verdict or a new trial, and
10. The penalty was excessive.

We are in essential accord with the findings and conclusions reached by Judge Callahan as set forth in his letter opinions of April 26, 1977 and May 18, 1977, except as hereinafter noted. All but two of the issues now raised are so clearly devoid of merit as to require no discussion. *R.* 2:11-3(e)(2). We comment briefly only on points four(B) and five(A) in defendant's brief.

The thrust of defendant's point five, as expanded at oral argument, is that his status as an amateur radio operator makes his radio station a "quasi-public-institutional use" exempting him from complying with Cranford's ordinance because the federal government has preempted the field.

He cites no authority for this proposition and we know of none. While federal regulations include standards for amateur radio operators, local authorities are not barred from regulating the height of antennas used by such operators since such matters do not impinge on the national interest. *Skinner v. Zoning Bd. of Adjust., Cherry Hill Tp.*, 80 N.J. Super. 380, 392 (App. Div. 1963).

The thrust of point four(B) is that the Cranford Zoning Ordinance permits only a maximum fine of $200 for any violation. *N.J.S.A.* 40:49-5 authorizes a municipality to prescribe penalties not in excess of $500 for the violation of ordinances. Contrary to defendant's contention, the ordinance here clearly does not violate the statute so that the penalty clause need not be declared void. See *Verona v. Shalit*, 96 N.J. Super. 20, 24 (App. Div. 1967).

However, the judge erred when he held that defendant violated the height provision of the ordinance every day the poles remained on his property. The complaint charged defendant with erecting poles which violated the height limitation. That occurred on one occasion and it was error to hold that defendant could be fined for each day the poles remained in place. The judge imposed a $1,000 fine for violation of that count in the complaint. We direct that that fine be reduced to $200.

Except as modified, the judgments are affirmed.

ORDER DISMISSING APPEAL

(Filed May 15, 1979)

This matter having been duly presented to the Court, it is ORDERED that the appeal is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 15th day of May, 1979.

/s/ Stephen W. Townsend
STEPHEN W. TOWNSEND
Clerk

ON PETITION FOR CERTIFICATION
(Filed May 15, 1979)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 15th day of May 1979.

/s/ Stephen W. Townsend
STEPHEN W. TOWNSEND
Clerk